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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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# No. 687

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JULIUS ROSENBERG AND ETHEL ROSENBERG,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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# SUPREME COURT OF THE UNITED STATES

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# No. 687

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JULIUS ROSENBERG AND ETHEL ROSENBERG,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Petitioners, Julius Rosenberg and Ethel Rosenberg, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered December 31, 1952 (R. 329), affirming an order of the United States District Court for the Southern District of New York, entered December 10, 1952 (R. 5),[1] dismissing their joint application under 28 U.S.C. § 2255, to vacate and set aside the judgments of conviction for conspiracy to

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[1] "R." refers to transcript of record herein; "C.R." refers to the transcript of record of the criminal proceedings which was filed in this Court — Docket No. 111, October Term, 1951. Copies thereof were annexed, as Exhibits "A" (Vol. I), and "B" (Vol. II), and made part of the instant application.

violate the Espionage Act [50 U.S.C. § 34, now 18 U.S.C. 794], under which they were sentenced to death.

## Opinions Below

The opinion of the Court of Appeals appears in the record at R. 329 and is reported in 200 F. 2d 666. The opinion of the District Court appears in the record at R. 8 and is reported in 108 F. Supp. 798.

## Summary of Matter Involved

### *History of the Proceedings*

Petitioners JULIUS ROSENBERG and ETHEL ROSENBERG, his wife, were convicted in March, 1951, after trial before judge and jury in the United States District Court for the Southern District of New York, of conspiracy, during World War II and for some years thereafter, to transmit information "relating to the national defense to the Soviet Union, with the intention to advantage that nation" (though not to injure the United States), in violation of Sec. 34, Title 50, U.S.C. [now U.S.C. 794] (R. 31).

The main concern of the prosecution was the theft of atomic-bomb information stolen from the Los Alamos Project and siphoned to the Soviet Union. Its case rested on the accomplice testimony of David Greenglass (brother of the petitioner Ethel Rosenberg) and Ruth, his wife. "If [their] testimony were disregarded, the conviction could not stand." *United States* v. *Rosenberg*, 195 F. 2d 583, 592 (C.A. 2d, 1952). David Greenglass, a co-defendant, pleaded guilty prior to the petitioners' trial, but was not sentenced until after the petitioners' conviction when he received a sentence of 15 years (C.R. 2-4; 1638). Ruth Greenglass, also an admitted spy, was never arrested, indicted, or prosecuted for her crime and is presently a free woman (C.R. 593, 740).

Judgments of conviction, sentencing both of the petitioners to death, were entered on April 5, 1951 (R. 31). Pursuant to these judgments, the petitioners were committed to, and are presently detained in the death house at Sing Sing Prison, Ossining, New York to await the execution of their sentences (R. 31-2). The United States Court of Appeals for the Second Circuit affirmed the judgments of conviction on February 25, 1952, and denied rehearing on April 8, 1952 (195 F. 2d 583, 609). This Court denied certiorari on October 13, 1952 (344 U.S. 838) and rehearing on November 17, 1952 (344 U.S. 889), Black, J., in each instance, noting his opinion that the petition should be granted.

The instant proceeding, under 28 U.S.C. § 2255, to vacate and set aside the petitioners' convictions and sentences, was instituted on November 24, 1952, in the United States District Court for the Southern District of New York by petition and order to show cause (R. 30-129).

The petition alleges facts to show that the convictions and sentences were unjustly, unlawfully and illegally procured in violation of the Constitution and laws of the United States and that the sentencing court was without jurisdiction to impose the sentences, so as to render the judgments subject to collateral attack (R. 30-129).

The Government was permitted to submit affidavits in opposition (R. 130-150). The petitioners were afforded the opportunity to supplement their petition by affidavit (R. 151-57). They were confined, however, to the submission of reply affidavits to rebut facts deemed by the District Court to have been put in issue by the Government's opposition affidavits (R. 157-167).

Upon the record thus made, and upon the files and records of the case, the District Court, on December 10, 1952 after oral argument (R. 238-328), dismissed the petition without a hearing. The Court of Appeals for the Second Circuit

affirmed the order of the District Court on December 31, 1952 (R. 329), and on February 17, 1953 entered an order staying the execution of the petitioners' sentences pending the due filing of a petition for a writ of certiorari and until further order of this Court.[2]

## The Present Proceeding

The record in this proceeding is an exposé of sordid scheming on the part of the prosecution to secure the con-

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[2] This case reaches this Court in an extraordinary posture: judicial reduction and executive commutation of these sentences have already been denied, although the petitioners have not exhausted their remedy in this Court. The events which led to this situation are a result of an egregious impatience of the sentencing court with petitioners' pursuit of judicial redress.

After this Court denied rehearing of its decision to deny to the petitioners a writ of certiorari to review their original convictions, the sentencing court re-fixed the date of executions for the week of January 12, 1952. No stays of execution were granted by the District Court or Court of Appeals pending the processing of the instant application. In the course of these proceedings, and within the statutory 60 day period after issuance by the Court of Appeals of the mandate in the criminal proceedings, the petitioners, on December 29, 1952, applied to the sentencing court for a reduction of their sentneces, which application was denied. On January 6, 1953, the sentencing court then entered an order staying the execution of the petitioners' sentence to afford them an opportunity to appeal to the President of the United States for executive clemency. The stay was to continue until the President acted and for five days thereafter. It was uniquely conditioned, however, in essence, upon the petitioners' refraining from pursuit of any judicial remedies, including the processing of this petition, until the President had acted.

On February 11, 1953, the President denied a commutation of sentence. On February 16, 1953, after a hearing for the refixing of execution date, the sentencing court, with knowledge of petitioners' intention to exercise their right to appeal to this Court, set the week of March 9, 1953, as the date of execution, on the thesis, expressed at the hearing, "that the time has come when . . . the administration of justice shall proceed with assurance and without delay. . . ."

After consideration of these facts and the substantiality of legal questions to be presented, and to protect the right of the petitioners to appeal to this Court, the Court of Appeals for the Second Circuit, on February 17, 1953 stayed the executions, pending the due filing of this petition with, and further order of this Court.

viction of these petitioners by fair means or foul. It establishes the deliberate use of false testimony, which, in at least one instance, the Government was constrained to admit (R. 149-50). It establishes conduct on the part of the prosecution, during the trial, designed to bring irremediable prejudicial influences to bear on the jury, which the court below asserted "cannot be too severely condemned" (R. 334). It establishes prosecution practices, before the trial, to turn the public mind and the jury against the petitioners, which the District Court in this case characterized as "opposed to all fundamental concepts of due process" (R. 13). It establishes that the prosecution grossly and deliberately inflated the quality of the offense to make inevitable the verdict and the imposition of the unprecedented sentences of death upon the petitioners. Through its immoral, unconscionable and intentional deceptions of the court and jury—some of which, fortunately, have been discovered in time—the prosecution "contrived a conviction through the pretense of a fair trial which, in truth, [was] used as a means of depriving" these petitioners of their very lives. *Mooney* v. *Holohan*, 294 U.S. 103 (1935)

## I

## Perjured Testimony

### 1. The Atom-Bomb Sketch Perjuries

The most flagrant perjury, in a case replete with perjury, is the crucial evidence from the mouth of David Greenglass, the star witness for the prosecution, of the transmission of "secrets" of the Nagasaki atom-bomb. Patently, had it been known that Greenglass' testimony in this major respect was perjured, the jury would have considered his entire testimony in another light. It has already been noted that the Court of Appeals, affirming in the criminal appeal, declared that the convictions could not stand with-

out the Greenglass testimony. The perjury acquires a most fateful significance from the trial judge's reliance on the assumed truth of the testimony as cause for imposing the unprecedented sentences of death upon the petitioners (C.R. 1614-15).

The crux of the Goverment's case was Greenglass' testimony that he delivered to Julius Rosenberg, in September, 1945, a sketch of the Nagasaki atom-bomb and twelve pages of written material descriptive of the component elements of that bomb, their action and inter-action, and the principles of operation of the bomb itself (C.R. 493, 495-98). The prosecution was permitted, under the "charts, maps and diagrams" rule, to offer in evidence an alleged replica of the sketch allegedly turned over to Rosenberg (C.R. 463). This replica was prepared in March, 1951, at the time of, and for the purpose of being introduced at the petitioners' trial. This replica is the celebrated Exhibit 8, which, together with the testimony orally restating the contents of the twelve-page report, was impounded by the trial court (R. 499).

Explicit proof that such testimony was wholly incredible did not appear in the original record because of a ruling of the Trial Judge excluding potential proof of such incredibility (R. 916), but the improbability of this testimony was implicit even in the testimony itself as originally given. Explicit proof of the total incredibility, i. e., perjury, of this testimony was supplied in this proceeding by the affidavits of two leading British, and one French, scientists, which had been appended to the petitioners' application (R. 113-123).

These affidavits, as will later be noted, establish that Greenglass' testimony is false because (1) it is inconceivable that anyone with Greenglass' lack of background and experience could originally ever have been capable of producing a sketch of a cross-section of the Nagasaki atom-

bomb and twelve pages of descriptive material relating thereto; and (2) because even had Greenglass been able originally to produce such sketch and descriptive material, neither he, nor even a trained scientist, could have reproduced them at the time of the trial, more than five years later, wholly from memory, and without aid from any other source.

Greenglass was not a scientist. His formal education was limited to high school (R. 82; C. R. 610-15). After graduation, he attended a polytechnical institution for a single semester and failed each of the eight courses in which he was enrolled (R. 83). His remaining adult education was restricted to attendance for a year and a half at the Pratt Institute in Brooklyn, N. Y. (R. 83). He never acquired a degree in science or engineering; nor had he ever taken any courses in calculus, thermodynamics, nuclear or atomic physics, or quantum mechanics (R. 83). In answer to the question whether he knew anything about the basic theory of atomic energy, he answered:

"I know something about it, yes, I am no scientific expert, but I know something about it." (C. R. 612)

He did not further define what he did know about "it."

This is the sum total of Greenglass' educational qualifications as shown of record.

Greenglass testified that prior to entering the Army in 1943, he had practical experience as a machinist. After basic training, he was first assigned to the Ordnance School at Aberdeen, Maryland, as a machinist (C. R. 396), and after service at various other posts, he was sent, in July, 1944, to the Manhattan District Project at Oak Ridge, Tennessee, for two weeks of orientation, prior to his transfer to Los Alamos (C. R. 397-98).

His orientation consisted of being told that Los Alamos was a secret project, but he was not told, and did not know,

what the secret was (C.R. 397). In August, 1944, he reached Los Alamos (C.R. 398). The most stringent regulations, which prevailed at the Los Alamos project affecting the conduct of employees, forbid persons on Greenglass' level from gaining access to information about the work, experiments or projects being conducted, except in the restricted area in which they worked (G.E. 1, 19, 20; C.R. 618-25, 406-09).

Greenglass never observed or examined the Nagasaki atom-bomb, or a blueprint, or drawing or sketch of the weapon at Los Alamos or elsewhere, from which he might have made a reproduction.

He swore that the original sketch and the twelve pages of expository matter which he allegedly delivered to Rosenberg in September, 1945, were composed by him from memory alone, revived out of scraps of oral information gleaned at the project through random questions and conversations (C.R. 493, 495-98, 609, 613, 619-21, 627-27).

The prosecutor asked Greenglass the following questions and received the following answers:

> "Q. . . . did you, in ensuing months, gather information concerning the atom bomb?
>
> A. I did.
>
> Q. Will you tell us just how you went about them?
>
> A. I would usually have access to other points in the project and also I was friendly with a number of people in various parts of the project and whenever a conversation would take place on something I didn't know about I would listen very avidly and question . . . the speakers to clarify what they had said. I would do this surreptitiously so that they wouldn't . . . I would do it so they wouldn't know.
>
> . . . . . .
>
> "Q. No, in addition to that fact, you yourself were working on various things used in connection with the experimentation used on the atom bomb?

A. That is correct.

Q. Such as this high explosive lens?

A. High explosive lens molds were made in my shop and I got—as a matter of fact, there were molds used on the atom bomb.

Q. Was it on the basis of this knowledge that you had accumulated over those months that you told Rosenberg you thought you had a pretty good description of the atom bomb itself?

A. I did." (C.R. 494-495)

This is the sum total of the prosecutor's direct examination of Greenglass and of Greenglass' testimony as to the means by which he, a machinist without any scientific training whatsoever, was able to obtain the highly technical and top secret information which allegedly made it possible for him to draw for Rosenberg a sketch of a cross-section of the Nagasaki atom-bomb, and to write out for him twelve pages of material descriptive of its component elements, their action and inter-action and the principles of operation of the bomb itself. It was solely on the basis of this "information" that Greenglass testified he was able to tell Rosenberg: "I think I have a pretty good description of the atom bomb." (C.R. 496)

Although, according to his testimony, Greenglass' ability to produce a sketch of the cross-section of the atom-bomb was based on "conversations" with scientists on the project, his testimony was a studious evasion of statement of the names of those from whom he obtained this information. The single exception was a soldier-scientist, William Spindel, and his information was confined to the fact that a man known at Los Alamos as Baker was actually the atomic scientist Nils Bohr (C.R. 620).

His claim to competence to reproduce the structure of the atom-bomb and explain its operation is belied by the

testimony of his own response to an inquiry of an alleged confederate in 1945:

> "The Witness: He wanted to know the formula of the curve on the lens; he wanted to know the H. E. used, and means of detonation . . . but the things he wanted to know, I had no direct knowledge of and I couldn't give a positive answer." (C.R. 453)

Nor could he, on *cross-examination* at the trial answer a similar question (C.R. 628):

> "Q. You did not even know the formula for the curvature, did you?
>
> A. That is exactly correct.
>
> Q. What? You had to be a scientist to know the formula, isn't that right?
>
> A. That is right."

The preposterousness of Greenglass' claim is enhanced when it is realized that his lack of scientific development or understanding was not compensated by the capacity of his powers of observation. Some indication of his lack of knowledge is illustrated by his testimony that, although he arrived at Los Alamos in August, 1944, it was not until his wife visited him on November 29, 1944, during a furlough to Albuquerque, that he discovered the project was concerned with the construction of the atom-bomb. He learned this fact only when his wife told him that Julius Rosenberg allegedly had told her—

> ". . . that I was working on the atomic bomb; that was the first I knew of it." (C.R. 399)

These facts formed the basis for the scientific judgment that Greenglass was incapable of having prepared the

sketch of the cross-section of the Nagasaki atom-bomb or the description of its workings.[3]

The judge had foreclosed inquiry into this specific subject on the trial. Derry, called as the Government's atomic expert, was asked, on cross-examination (C.R. 916):

> "Q. Would you say as a scientist, a graduate engineer who has received college courses and received a degree in engineering, and had the experience you have detailed to us here, that a machinist without any degree in engineering or any scientist (science) would be able to describe accurately the functions of the atom bomb and its component parts . . . both in relation to their independent functions and their interrelated functions?"

The judge, *sua sponte*, sustained the objection.

In this proceeding, the record evinces independent evidence, necessarily *dehors* the trial record, of Greenglass' utter incapacity to have performed as he testified he did.

The affidavit of T. R. Kaiser, a British scientist, presently employed in connection with British atomic-bomb development, states:

> "Question . . . Could a person of Greenglass' background and experience have produced in 1945 a sketch of a cross-section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such a bomb and its component parts, drawing solely from memory and without the aid or assistance of any person or written matter or technical or scientific source of coaching?
>
> Answer: . . . It is inconceivable that a man in the position of said Greenglass, without specialist training and experience, could have accomplished this feat in 1945." (R. 120-21)

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[3] The deposition of Kaiser, and the other scientists hereinafter referred to, were founded upon a reading of the full testimony of Greenglass, as it related to scientific matters, and of John A. Derry and Walter Koski, the Government's "expert" scientific witnesses.

The conclusive evidence that the testimony of Greenglass was perjury and that the Government knowingly contrived it for the purpose of, and deliberately used it at, the trial is found in the circumstances surrounding the introduction into evidence of Exhibit 8.

Greenglass swore that the replica of the sketch of the Nagasaki atom-bomb he testified he gave Rosenberg, Exhibit 8 (made five and one-half years after its alleged original production), was prepared by him from memory alone and without the aid of any person or any reading sources furnished to him by the authorities or any other person (C.R. 609-11; R. 82-3).

He swore further that his trial testimony, orally restating the contents of the twelve-page report that allegedly accompanied the delivery of Exhibit 8, was also based solely on unaided memory (C.R. 608-11; R. 82-3).

The affidavits of scientists, that form part of this record, are unequivocal attestation to Greenglass' absolute incapacity to have performed this feat.

T. R. Kaiser states (R. 121):

> "I repeat my answer to the previous question and say that it is likewise inconceivable that the said David Greenglass could have reproduced the matter in question in 1951 without the aid or assistance of any person or written matter or help from any technical or scientific source."

(This scientist even questioned his own ability to perform a like fact in his own special field.)

Jacques S. Hadamard states (R. 122-23):

> "It is inconceivable that Greenglass could have reproduced replicas of a cross section of the Nagasaki type of bomb plus explanatory matter after a lapse of five or six years, relying solely on his unaided memory. It is more inconceivable still that Greenglass could have given lengthy and detailed explanations not only

on the component parts of the bomb, but also on their functions and workings; all he could not have any idea of and which nobody is alleged to have given him even an idea."

J. G. Crowther states (R. 115):

". . . that it is his opinion that it would have been impossible for the said David Greenglass to have reproduced in the years 1950 or 1951 a reliable replica of a sketch of a cross section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such bomb and its component parts, the said sketch having been last seen by the said David Greenglass five years previously and the said David Greenglass relying for the reproduction solely on memory and without any outside aid or assistance."[5]

Derry, one of the Government's "experts", was shown Exhibit 8 and had read to him the untranscribed explanatory oral testimony. He stated that the exhibit was a substantially accurate representation of a cross-section of the Nagasaki atom-bomb and affirmed, as well, the substantial accuracy of the oral explanation (C.R. 908-15).

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[5] Greenglass had also testified he delivered (1) to Julius Rosenberg in January, 1945, a sketch of a high explosive lens mold and related descriptive material used in atomic experiments at the Los Alamos project (C.R. 428-29, 438-39); and (2) to Gold, a named conspirator, in June, 1945, sketches of a later development of a lens mold in schematic view, and explanatory data (C.R. 458-60).

On the same theory, the Government had been permitted to introduce replicas of Exhibit 2 (January, 1945, incident) and Exhibit 7 (June, 1945, incident) similarly prepared prior to the trial, and Exhibit 6 (June, 1945, incident) prepared on the day of Greenglass' arrest, all allegedly from memory alone, without outside aid.

The same scientists referred to above expressed varying degrees of incredulity respecting Greenglass' capacity to produce the replicas in 1950 and 1951, in spite of the fact that he had actually worked on phases of the construction of these mechanisms (R. 119-21; 115; 122-23). These opinions necessarily fortify the conclusion that Greenglass was not capable of having produced the replica of the cross-section of the Nagasaki atom-bomb.

Since the scientific affidavits show the incapacity of Greenglass to draw or explain the cross-section of the Nagasaki atom-bomb, and since Exhibit 8 and the accompanying explanatory testimony was a substantially accurate representation, it is patent that Greenglass' testimony was false (1) as to his preparation of the original sketch and report; and (2) as to his preparation of Exhibit 8 and its testimonial explanation from memory alone, and without any outside aid.

The indicia of the Government's connivance to produce, and its deliberate and knowing use of, this false testimony are found:

(1) In the inherent improbability of Greenglass' story, precluding the possibility of the prosecutor's innocent use of it.

(2) In the singular fact that although Greenglass allegedly "confessed" in the early summer of 1950 (C.R. 577-78; 604), and although the delivery of the sketch (and information) concerning the Nagasaki atom-bomb formed the core of the Government's case, this incident was not, as were other alleged transmittals, listed as an "overt act" even in the last superseding indictment of January, 1951 (C.R. 2-4).

(3) Inasmuch as Exhibit 8, as well as Exhibits 2, 6 and 7, were prepared by Greenglass after he was already in the custody of the United States Government, he could not have been aided or coached by any person or reference books without the knowledge of the prosecuting authorities or their agents.

These exhibits went to the gravamen of the case and the essence of Greenglass' testimony. As can well be understood, they constituted to the lay mind of the jury most damaging evidence. The suppression concerning the truth, that these exhibits were literally "manufactured" for trial,

as a hearing on this petition would have more fully revealed, was a most profound imposition upon the court and a measure of the magnitude of the extent to which the evidence on which the petitioners were convicted was a result of fabrication.

2. The Passport Photographer Perjury

Ben Schneider, a photographer (R. 1425-26), was the last Government witness. Produced as a "surprise" in rebuttal, his testimony provided a dramatic climax to the trial. His name had not appeared on the Government's list of witnesses (C.R. 51-2), notice of which in advance of the trial was required to be given to the petitioners [18 U.S.C. § 3432]

He testified on March 27, 1951. He swore that in May or June, 1950 he had taken passport photos of the petitioners and their children at his photography shop, located within walking distance from the petitioners' home (C.R. 1427-29). He swore further that the first time any Government official communicated with him was on the morning of March 26, 1951 (the day before he testified) when two F.B.I. agents exhibited to him photographs of the petitioners and he then and there, initially, made a positive identification of the petitioners as the persons whose passport photos he had taken (C.R. 1425-26; 1429).[6]

He testified then as follows:

"Q. Did you then deliver it (the photos) to Mr. Rosenberg?

A. Yes.

Q. Did he pay you?

A. That's right, sir.

[6] The Government pressed the claim concerning this first approach to the witness on the morning of March 26, 1951 to excuse its non-performance of the statutory requirements (C.R. 1425-26).

Q. *And is that the last time you saw him before today?*

A. *That's right.*

Q. Now when the agents came to visit you yesterday, did they show you photographs?

A. They did.

Q. Was it from those photographs that you picked him (Rosenberg) out?

A. That's right.

Q. And is it seeing him here with his wife that recalls it to your memory that they were the persons who came in?

A. That's right; that's right." (C.R. 1429)

The answer to the question relating to the "last time" the witness saw Rosenberg before "today" (the day he testified) was false and known by the prosecution to be false.

The record shows that the Government admitted that after the alleged visit of these F.B.I. agents and later that day, March 26, 1951 (the day prior to his testimony) Schneider was introduced secretly into the courtroom by an F.B.I. agent, on the order of the prosecutor, in violation of the court's direction excluding all witnesses, to secure his *uncertain* identification of the petitioners made earlier that morning (R. 86).[7]

The Court below finds absence of falsity in Schneider's answer because "on cross-examination of Schneider at the trial, both court and counsel treated the answer as meaning 'before the trial' " (R. 336). The finding is without the slightest foundation (C.R. 1429-41).

The Court below found that Schneider, having "no motive for falsehood", had not intentionally lied (R. 336). The secretive intrusion of this witness into the courtroom without the knowledge of the petitioners and the

[7] The Government admitted these facts in its opposing affidavits (R. 149-50).

court, and in violation of its plain direction that all witnesses be excluded from the courtroom; and the reason for the necessity of the prosecutor's introduction of him into the courtroom, all attest to the motive for his lie: the concealment of his uncertain identification. The prosecutor's motive, the only relevant factor, was to keep from the court his deliberate breach of its order.

The issue of Schneider's ability to identify the petitioners was squarely put in issue. The cross-examination of Schneider revealed that he had seen photos of the petitioners in the newspapers after their arrest, but, he claimed, he could not, from these pictures, identify them *as persons who took passport photos in his place*, because there was no side-view (C.R. 1432-33). This record shows that he was not even certain when the F.B.I. agents came to him (R. 86), although he testified that when they showed him a side-view of the petitioners he was positive that it was they who had come to his shop to take passport photos and had told him, at the time of the taking of these pictures, that the family intended to go to France to settle Ethel Rosenberg's estate (R. 85; 1428-29).

For the Court below to have ruled that the falsity was immaterial because the Rosenbergs' testimony shows that they *may* have entered the Schneider shop to take casual photos (R. 336), is a patent absurdity. The question of identification of the Rosenbergs as casual customers was not in issue. It was their identity as *takers of passport photos*, categorically denied by the Rosenbergs, that was of the essence of his testimony.

Schneider's testimony was highly important for two reasons. First, the main subject of his testimony related to the sensitive question of "flight." Secondly, it served to corroborate, where there was no other corroboration, the testimony of David Greenglass that the petitioners intended to flee this country to avoid arrest (C.R. 529, 713).

It is not an unfair inference that had the jury known that this witness apparently needed aid in his identification, it would have substantially affected their acceptance of the testimony.

3. The Greenglass "Confession" Perjury

David Greenglass testified he did not "conscientiously withhold" any facts from the agents of the Federal Bureau of Investigation on the night of his apprehension on June 15, 1950, and that the facts he related to them were "to the best of [his] knowledge at this time" (R. 78; C.R. 577-78).

On the morning of June 16, 1950, a few hours before his arraignment, Greenglass retained O. John Rogge, Esq. to represent him as his attorney. He swore he had not told his attorney "to fight the case." (R. 79; C.R. 577-78).

This testimony was obviously designed to convey to the jury that Greenglass had made an immediate and honest disclosure of his and his wife's involvement and of his implication of Julius Rosenberg in the crime of espionage.

The testimony was false and perjurious and known to be so by the prosecutor.

Nevertheless, U. S. Attorney Saypol, the chief prosecutor, permitted this testimony to stand without challenge and without any attempt during the trial to elicit the truth.

The proof of the falsity came later from the lips of the prosecutor.

On Greenglass' sentence (which occurred after the trial and sentence of the petitioners) U.S. Attorney Saypol stated in open court:

> "I remember well . . . at [Greenglass'] arraignment . . . Mr. Rogge protested his innocence. Through Ruth Greenglass; his wife, came the *subsequent recantations of these protestions, their cooperation and the*

*disclosure of the facts by both of them.* (Emphasis ours).

Rogge supplied confirmation. On those same sentence proceedings of Greenglass, he told the Court:

> "I want to emphasize . . . that [David Greenglass] did cooperate with the government and *almost* from the outset. . . ." (R. 81; C.R. 1628).

The circumstances surrounding Greenglass' ameliorated treatment in jail (C.R. 596-99) after his wife's initial and continued consultations with Rogge (C.R. 732, 779-80); the ensuing conference in the U.S. Attorney's office between David and Ruth Greenglass, Rogge and the prosecuting authorities (C.R. 742-43); the vagueness of the Greenglasses about the subject matter of the conference, as contrasted with their clear memories of events five years old (C.R. 601-2, 743); the written statements of the Greenglasses and their cooperation with the authorities that followed this conference (C.R. 604, 743); the immunization of Ruth Greenglass from prosecution (C.R. 740); the treatment accorded Rosenberg on June 16, 1950 when he was interrogated by the F.B.I. and not detained after the questioning (C.R. 1137-41) and his arrest a few days after the Greenglass' conference with the authorities, all offer eloquent proof that the prosecutor knew that Greenglass had not "confessed" immediately and yet, had allowed the witness to so testify.

A sharp issue of fact was presented to the jury, the resolution of which turned on whether they believed the Greenglasses or the petitioners.

The petitioners, who have always asserted their innocence, defended on the ground that the Greenglasses schemed to implicate them in the crime of which they were convicted, "as part of a deal" with the prosecution, to mitigate

retribution against themselves for their confessed crimes.

If David Greenglass had not "confessed" to the authorities until some time after his apprehension, the inexorable logic of the defense position would have been evident. False testimony that his "confession" was immediate correspondingly weakened this position, and substantially contributed to the conviction of the petitioners.

The Court below, in refusing to regard the statement of Saypol "as an admission that Greenglass had committed perjury" closed its mind to the plain meaning of the word "recantation." A recantation, as is well known, is a retraction and denotes a renunciation. To recant is to "recall," "withdraw or repudiate formally and publicly opinion formerly expressed," "take back openly," "retract," "revoke," "repudiate", "disavow," (*Webster's New International Dictionary* (2nd Ed.) Unabridged. It must be assumed that Mr. Saypol, as a lawyer, was not using the word "recantation" except in its normal, dictionary, and usually accepted meaning. The only reasonable inference to be drawn from Mr. Saypol's remarks is that Greenglass did not "confess" immediately but only after the intervention of his wife did he "subsequently" repudiate his earlier claims of innocence and "cooperate" and "disclose" the "facts".

II

## The Perl Indictment

The history of the Perl indictment records a scandalous defilement of the administration of justice by officials entrusted with the grave responsibility of prosecution. During the trial of the petitioners, one William Perl, listed as a prospective prosecution witness (C.R. 52), and inferred

to be an espionage agent, was indicted for perjury in denying that he knew: (1) the petitioner, Julius Rosenberg; (2) Morton Sobell, a co-defendant on trial with the petitioners; (3) Ann and Michael Sidorovitch, (husband and wife) the former named by Greenglass on the trial as a confederate of the petitioners, and both on the list of Government witnesses, although not called to testify; and (4) Helene Elitcher, the wife of Max Elitcher, the first prosecution witness, herself named on the list of Government witnesses, although not called (R. 70).

Defense counsel learned of the charges against Perl on the morning following the unsealing of his indictment and his arrest. The fact of Perl's indictment, to which their knowledge, at that time, was confined, was brought immediately to the attention of the trial judge. At an off-the-record conference before the judge between the prosecutor and defense attorneys, the latter expressed concern over the possible impropriety of the procurement and publication of the indictment. They were assured by the prosecutor that the indictment was returned in the regular course of the administration of criminal justice, and were enjoined by the trial judge to accept his word (R. 155, 207-8, 268). This representation was a deliberate falsehood. It was purveyed by the prosecutor to conceal from the Court and the defense the stratagem of the prosecution to "time" the Perl indictment as a means of adducing inculpating evidence through the channels of the mass media of communication and to convey to the jury the idea that the petitioners were further associated in the business of espionage. Only the passage of time uncovered the purposefulness of the deceit.

Perl's alleged perjury was charged to have been committed before a federal Grand Jury, sitting in the Southern District of New York, on August 18 and September

11, 1950, some seven months prior to his indictment on March 13, 1951 (R. 70, 73).[8]

The trial of the petitioners commenced on March 6, 1951 and terminated when the jury returned its verdict of guilty on March 29, 1951. The Perl indictment, returned on March 13, was unsealed on the evening of March 14, 1951, by Irving R. Kaufman, the presiding judge in the petitioners' trial (not sitting in the regular criminal part), and a bench warrant issued (R. 74).

David Greenglass, the Government's main witness, had that day completed his testimony. Ruth Greenglass, his wife, the second major witness, on the morning of March 15, was in the midst of cross-examination. Perl was apprehended the night of March 14 and arraigned March 15 (R. 74).

Upon Perl's arrest, the chief prosecuting attorney made a public statement—characterized by the Court below as "wholly reprehensible" (R. 334)—which the press, on March 15, reported to be:

> "Mr. Saypol said that Perl had been listed by the Government as a prosecution witness in the current espionage trial. *His special role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who*

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[8] The Government opposition affidavits, assert that, although "extensive investigation" of Perl's Grand Jury testimony was conducted, only an alleged admission of Perl, made on March 6, 1951 precipitated the indictment (R. 137, 142-43). These affidavits are contradicted by the record (e.g., R. 154, C.R. 304). To support the allegations of *mala fides* of the prosecution, petitioners made an offer of proof to subpoena the minutes of the Grand Jury that returned the Perl indictment, in order to show that the Government had proof, months before its return, to prosecute Perl for his alleged crime. This offer was rejected by the Court (R. 249-50).

The Court of Appeals properly excluded the Government affidavits from its consideration. *White* v. *Ragen*, 324 U.S. 760 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945); *Williams* v. *Kaiser*, 323 U.S. 471 (1945). The contradictions established an issue of fact which could be determined only after a hearing, and not on the face of the record. *Walker* v. *Johnston*, 312 U.S. 275 (1941).

*are the key Government witnesses at the trial.*" (Emphasis added) (R. 74)

To the date of the filing of the petition herein, Perl had not been brought to trial, although, over Government resistance, he had repeatedly pressed for an immediate trial. In June, 1952, more than a year after the conclusion of the petitioner's trial, the Government finally revealed its hand by its refusal to try Perl until "the Rosenberg case and related matters have been concluded" (R. 75-77, 180-82).

Upon this record, the Court below concluded that petitioners had made a showing "that [the] publication of the indictment was deliberately 'timed' " by the prosecution (R. 334).

The publication of the Perl indictment was accompanied by sensational front-page stories in every New York City newspaper (R. 70-73). All reportage explicitly connected the indicted Perl in criminal confederacy with the petitioners. The common denominator of banner headline coverage read: "College Scientist Arrested As Liar in Atom Spy Case". (R. 70-71). The contents of the news stories exploited Government affirmations of Perl's guilt and its specifications of his alleged enmeshment in espionage to corroborate the testimony of prosecution witness and to endow relationships, innocent on the face of the record, with invidious meaning. The color of veracity was infused into the Greenglass testimony: (1) that the petitioners were confederated in espionage with Ann Sidorovitch; and (2) with a "Cleveland contact", by virtue of the reporting of Perl's former and the Sidorovitches' contemporaneous Cleveland residence (R. 75).

Elitcher's testimony of purely social meeting among himself, Rosenberg, "William Mutterperl" [stated to be Perl's former name] and others (R. 304-5), was given conspiratorial overtones by the stigma which attached to Perl. The disclosure of the prosecutor, reported in the press that

Perl . . . was part of the whole atom spy investigation and was given money by Vivian Glassman to flee the country" (R. 73), made it impossible, thereafter, for the name of Vivian Glassman to be associated innocently with the petitioners (C.R. 1193-95).

The prosecutor, in the trial itself, made capital of the public indictment of Perl and newspaper accounts which he had himself inspired. At the outset of the cross-examination of Rosenberg, the prosecutor introduced the subject of a Perl-Rosenberg relationship in a manner to evoke, necessarily, information concerning Perl's arrest for perjury and to indicate that his sole interest was to place the name of the indicted Perl before the jury in criminal combination with Rosenberg (R. 75, C.R. 1159-60). In the same way, the prosecutor converted to his service the criminal repute which he had himself publicly attached to the name of Vivian Glassman, to cast doubt on Rosenberg's testimony of their noncriminal association (R. 75; C.R. 1193-98).

The coup effected by the prosecution in the "timing" of the indictment of Perl carried over into the trial period its pre-trial tactic of instigating and promoting damaging newspaper publicity that induced a communal acceptance of the petitioners' guilt and instilled hostility against them.

## III

### Government Inspired Trial and Pre-Trial Publicity

The petitioners represented that a tremendous and almost unprecedented volume of pre-trial and trial newspaper publicity, caused and stimulated by the prosecutive officials, had deeply ingrained in the public of the Southern District of New York a profound pre-conception of the petitioners' culpability; no jury chosen from among this

section of the population could have escaped that hostile influence in arriving at its verdict (R. 34-35).

The record established in minute detail that at every step in the processing of the prosecution of the petitioners, the Government "fed" information to the press concerning them. (R. 61-69). This information—buttressed by the prestige of the F.B.I., the Justice Department and the local U. S. Attorney's office, from which it emanated—(1) affirmed the guilt of the petitioners; (2) disclosed evidence which it intended to use at the trial, as well as alleged evidence never produced at the trial; (3) asserted that they were Communists and that that ideological tie was the motivation for their crime; (4) connected them with Fuchs and other confessed spies and acknowledged Communists who, it was said, with them, were solely responsible for the Soviet development of the atom bomb (R. 61-69; 161-64).

The first press release—issued jointly by the then Attorney General, J. Howard McGrath, and J. Edgar Hoover, Director of the Federal Bureau of Investigation, on the night of the arrest of the petitioner, Julius Rosenberg—was virtually a pre-trial hearing—without benefit of defense—of the prosecution's case, and a characteristic example of the prejudicial pre-trial revelations made by the prosecutive officials to the press. The statement, detailing almost the full scope of evidence to be presented at the trial, asserted (R. 161-63):

> "J. Edgar Hoover, Director of the Federal Bureau of Investigation, in discussing the background of the case, said that Rosenberg is another important link in the Soviet espionage apparatus which includes Dr. Klaus Fuchs, Harry Gold, David Greenglass and Alfred Dean Slack."
>
> . . . . . .
>
> ". . . Investigation to date reveals that Rosenberg, an American-born engineer, made himself avail-

able to Soviet espionage agents so he 'could do the work he felt he was slated for' and so he might 'do something to directly help Russia' ".

". . . his employment was suspended on February 9, 1945, when he was removed by the Secretary of the War Department acting on the recommendation of Rosenberg's commanding officer on the basis of information indicating Communist Party membership. Rosenberg made numerous unsuccessful attempts to be reinstated."

The statement unabashedly announced, as well, the official conviction of Rosenberg's guilt, and qualitatively aggravated the heinousness of his alleged crime (R. 162):

"The gravity of Rosenberg's offense, Mr. Hoover stated, is accentuated by the fact that through his implication in the espionage ring as a native born American citizen he aggressively sought ways and means to secretly conspire with the Soviet Government to the detriment of his own country."

These statements occurred in the context of antecedent and contemporaneous months of widespread and intensive publicity accorded: (1) communism in general; (2) communists as spies; (3) Fuchs' espionage activities, Gold's espionage activities, Greenglass' espionage activities; Brothman and Moskowitz's espionage activities—all resulting either in confessions or convictions, supported by the testimony of witnesses announced to be those who would testify against the petitioners (R. 34-61).

During this period, unlike any preceding or following, there occurred a constant barrage of stories—stemming from Fuchs' and his cohorts' "betrayal"—as to the immediacy, possibility and probability of atomic attack on the United States, in general, and the City of New York in particular (R. 34-61).

Each of these subject matters, almost by common consent, is acknowledged to be a matter of high volatility and passion-arousing qualities. The almost 600 newspaper features, annexed to the petitioners' application, indicate the degree to which the community was saturated with accounts and editorializations of these matters (Exhibits II-XV).

There was no let-up in the publicity which kept the petitioners' alleged misdeeds in the public mind from the time of their arrest to the time of their trial, even though for short periods their specific names may not have received explicit mention. Even in a metropolis as "sophisticated" as New York City, the crime with which the appellants were charged was a *sui generis* "sensation". Even to the "sophisticated" New Yorker, the threat of mass annihilation, predicted as a result of the petitioners' alleged acts, could not be equated with the run-of-the-mill urban "sensations" daily ingested at the breakfast table. The matters concerned were of vital interest to every citizen in terms of his own personal survival, the unprecedented danger of which was represented to him every day, not only by reading the newspapers, but by the urgent effort to whip into shape a functioning civilian defense apparatus immediately capable of coping with the "imminent" danger of attack upon this city and country (R. 56-57).

The Government's announcements concerning the petitioners, in which inhered each subject of the massive publicity set forth in the petition, had the inescapable effect of focussing the public hostility, aroused by each separate subject, upon the petitioners as the embodiment of all, resulting in a public pre-conception of guilt and hostility against them. This evaluation of a public attitude, under the circumstances of this case, is scientifically demonstrable,

as shown by the materials in the Appendix to this petition, submitted herein.[9]

The only conclusion of the Court below, with respect to this showing, was that "the Delaney [*Delaney v. United States*, 199 F. 2d 107 (C. A. 1st, 1952)] publicity [was] more obviously damaging and much closer to the date of trial . . ." (R. 333).

## IV

## The Atom-Bomb "Secret"

The record shows facts to establish that the Government, or its agents, arbitrarily and capriciouly classified the material allegedly transmitted by the petitioners to the Soviet Union as "secret"; and that in fact it was not "secret" but widely known and published throughout the world—and especially in the Soviet Union, the alleged beneficiary of the transmittal (R. 87-112; 123-27).

The Court below relied on the District Court's "assumption" that what the petitioners' application said was so, but, nevertheless, reached the factual conclusion that it could not be said that "in the United States this information has been made public nor . . . that 'it has become available in one way or another to any foreign government.'" The Court below "had nothing to add" (R. 336).

## Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254. The decision of the Court of Appeals for the Second Circuit was entered December 31, 1952.

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[9] The petitioners made an offer of proof of the testimony of an expert in social psychology to aduce proof, taking into account scientific criteria for evaluating mass reaction, to sustain its contention as to the effect of the publicity barrage in this case. This offer was rejected (R. 242).

## Statute Involved

The application of the petitioners is founded on 28 U. S. C. 2255, which provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, § 114, 63 Stat. 105."

## Questions Presented

1. Whether, in a capital case, circumstantial proof tending to show the knowing use of perjury by the prosecutor to bring about the conviction, is sufficient to warrant a hearing, under 28 U. S. C., Sec. 2255, to determine the issue.

2. Whether, where there is evidence tending to show that there was fraudulent abuse of process by the "timing" of an indictment by the prosecutor of one not then on trial, with the intent to prejudice the rights of an accused, a hearing should be granted, under 28 U. S. C., Sec. 2255, to determine whether there was such an abuse of process.

3. Whether, where there is evidence tending to show that there was a fraudulent abuse of process by the "timing" of an indictment by the prosecutor of one not then on trial, with the intent to prejudice the rights of an accused and having the effect of producing prejudicial publicity during the trial, a hearing should be granted under 28 U. S. C., Sec. 2255, to determine whether the accused was deprived of a fair trial.

4. Whether, when there is evidence tending to show pretrial publicity of a character to bring about communal prejudgment or guilt and hostility against an accused, originating from statements made by the prosecuting authorities, a hearing, under 28 U. S. C., Sec. 2255, should be granted to determine whether the accused was deprived of a fair trial.

5. Whether, in a prosecution under the Espionage Act, in which the secrecy of the information, the subject of the crime, is an essential element thereof, where there is evidence tending to show that the information was widely known and published, a hearing should be granted, under 28 U. S. C., Sec. 2255, to determine whether the information had been arbitrarily classified by the Government as "secret".

## Reasons Why the Writ Should Be Granted

The basic reason why certiorari should be granted is found in the Court of Appeal's sanction of a departure from the accepted and usual course of judicial proceedings, in upholding the District Court in its refusal to direct a hearing on claims which raise serious questions as to decency and fairness in the administration of justice. (1) The decision of the Court below raises the question as to whether a claim of the use by a prosecutor of knowingly perjured evidence to procure a verdict, which is promised on circumstantial evidence alone, may be decided, under 28 U. S. C. Sec. 2255, on the face of the pleadings. The determination reached by the Court below is in probable conflict with the decisions of this Court in *Price* v. *Johnson*, 334 U. S. 266 (1948) and *Walker* v. *Johnson*, 312 U. S. 275 (1941). (2) The decision of the Court below raises the question of whether the decisions of this Court in *McNabb* v. *United States*, 318 U. S. 332 (1943) and *United States* v. *Mitchell*, 322 U. S. 65 (1944) are broad enough to control the misconduct of quasi-judicial officials, in the interests of the proper administration of justice, where such misconduct amounts to an abuse of the courts and the machinery of law enforcement. (3) The question is raised in this Court for the first time, as to whether this same power may serve to eradicate the expanding evil practice of prosecutors to exploit the power of the

mass media of communication to influence the outcome of judicial proceedings in criminal cases. The decision of the Court below is in probable conflict with that of the First Circuit in *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1st, 1952); and (4) The decision of the Court below, in refusing the petitioners a right to be heard on their claim that the information, allegedly the core of the charge against them under the Espionage Act, was not "secret", but widely and publicly known, and arbitrarily classified by Government authorities as "secret", is in probable conflict with the decision of the Court in *Gorin* v. *United States*, 312 U. S. 19 (1941).

I

**Perjured Testimony**

The first concern of the just and compassionate mind in a capital case is the concern that no two people shall go to their death where there have been facts shown to indicate that the conviction for which they may die was procured by the knowing and deliberate use of false testimony by their prosecutor, without, at least, affording to them the opportunity to establish their claim. It becomes the urgent concern of this Court when it is recognized that the proposition, on which the decision denying them this opportunity rests, will make a shambles of the landmark decision in *Mooney* v. *Holohan*, *supra*, and render the "great writ" of *habeas corpus*—and the analogous Section 2255—impotent to perform its function "to make certain that a man is not unjustly imprisoned." *Price* v. *Johnson*, 334 U. S. 266, 291 (1948)

Section 2255 of Title 28, U. S. C. announces, by its terms, the right of a petitioner to a hearing to determine his right to vacation of his sentence and release "unless the motions and files and records of the case conclusively show that the prisoner is entitled to no relief." The lower Court's deci-

sion, in effect, holds, to the contrary, that unless the moving papers (files and records) conclusively show that the prisoner is entitled to relief, no hearing will be made available. This is the inevitable force of its determination that a court may, without a hearing, resolve the conflict of inferences, arising from facts shown in the record, which tend to establish the right to relief (Compare R. 331 with R. 335-6).

Where the claim to be relieved of a conviction and sentences is founded upon the connivance of the prosecution to obtain the conviction by the use of perjured testimony, it is a rare case that a petitioner, without court process, may unlock from the bosom of the conniving prosecutor, or his perjured witness, direct evidence of their conspiracy. The real vigor of the writ of *habeas corpus*, in these circumstances, on a showing of facts from which it may be inferred that such a conspiracy was effected, lies primarily in the right to a hearing, where the power of the court may produce from unwilling witnesses and from the lips, the files and records of the conspirators, the direct proof which, most often, they alone control. See, e. g., *United States ex rel. Montgomery* v. *Ragen*, 86 F. S. 382 (N. D. Ill. E. D. 1949).[9a]

The decision of the Court of Appeals deprives the writ of *habeas corpus* of this force and confines the expectation of successful challenge of a contrived conviction to the rare case by assuring the right to a hearing only in those cases where *direct* proof is made. For the rest, a petitioner must

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[9a] This has not meant that a hearing must be granted where the claim is "palpably unmeritoriousness": *i.e.*, a bald assertion, unsupported by a showing of facts from which the knowing use of perjury may be inferred. *United States ex rel. McCann* v. *Adams*, 320 U.S. 220, 221 (1943); *See: Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C.C.A. 10th, 1941); *Ex parte Deatherage*, 98 F. 2d 793 (C.C.A. 9th, 1938); *Tinkoff* v. *United States*, 129 F. 2d 21 (C.C.A. 7th, 1942); *Sanders* v. *United States*, 183 F. 2d 748 (C.A. 4th, 1950) cert. den. 340 U.S. 921.

run the gamut of a court's speculations in regard to the meaning and portent of the *circumstantial* facts alleged, and suffer its conclusion, *deduced* from those facts, as a substitute for the conclusive proof adducible at a hearing. The logic of *Walker* v. *Johnson*, 312 U. S. 275, 286-7 (1941), directs that such contradictory inferences should "only serve to make the issues which must be resolved by evidence taken . . . [on a hearing] . . . not by the pleadings and affidavits".

The unjust and absurd result of the adoption of the contrary practice is made apparent by this case.

Where the witness Schneider testified he had not seen the petitioners between May or June, 1950 and "today" (the day he testified), although, in fact, he had been secretly introduced into the courtroom by the prosecutor "yesterday", the Court concluded that Schneider's testimony "was not intentionally false," on the basis of its speculation that "before today" was generally understood by the parties to mean "before three weeks ago" (i. e. "before the trial"). This witness, the record shows, was not certain of his identification of the petitioners as the takers of passport photos in his shop. The prosecutor, the record shows, knowing this, secured the witness a pre-view of the petitioners, in deliberate violation of the trial court's ruling excluding witnesses. Surely, Schneider's testimony, available only at a hearing, is most apt to ascertain: (1) whether he misunderstood the denotation of "today", or (2) whether he deliberately failed to mention the prior identification to secure his testimonial probity and/or to conceal his violation of the court's order. Surely, the testimony of the prosecutor, and his aides is most appropriate to determine: (1) whether the prosecutor—in permitting the witness to testify and in explicitly affirming the veracity of it (C. R. 1429 and C. R. 1437)—misunderstood the use of the words "before today", or (2) procured or permitted this wit-

ness to testify falsely to conceal his deliberate violation of the trial court's order.

Where the witness Greenglass testified at the trial that from the *immediate* time of his apprehension he did not "conscientiously withhold" any information concerning his criminal involvements, and that he did not tell his lawyer to "fight" the case, and where (1) the attorney for the witness stated, after the trial, that the witness had "co-operated" "*almost* from the outset", and (2) the prosecutor himself revealed, after the trial, that, at first, the witness had "protested his innocence", and that only later, after the intervention of his wife, did he make a "recantation of those protestations", and, (3) other circumstances existed to show that Greenglass was not immediately "co-operative", the Court decided that the witness had not lied, on the basis of its speculation that (1) "*almost* from the outset" meant "almost *from the outset*"; and that (2) "recantation" did not mean "recantation", as the word is usually understood. Surely (1) the testimony of the witness himself (now in Government custody); (2) the testimony of the witness' wife, now at liberty at the sufferance of the Government; (3) the testimony of the prosecutor, verifiable by his files and records; and (4) the testimony of the attorney for the witness and his wife, verifiable by his files and records, are the only sound basis on which to evaluate the verity of the conflicting inferences which may be drawn from the facts shown.

Undoubtedly the most aberrant aspect of the decision of the Court below was its treatment, in the same respect, of the most crucial allegations of the petitioners' application with reference to Greenglass' perjury, relating to the production and pre-trial reproduction of a sketch of a cross-section of the Nagasaki atom-bomb and its accompanying twelve-page report. The egregiousness of the Court's deci-

sion here is further emphasized by its singular misconception of the petitioners' claim of perjury.

The opinion of the Court clearly shows that the Court was unaware:

(a) that the petition alleged any perjury and its knowing use, in relation to the testimony of Greenglass that he had been able, during the trial, wholly from memory and without aid from any other source, to produce Exhibit 8 and the accompanying explanatory testimony. (*On the contrary, the Court assumed* that such allegations of perjury, and the knowing use of perjury, *were confined solely to Government Exhibits 2, 6, and 7, alleged replicas of sketches only of the lens molds used in atomic bombs*);

(b) that the record contained the affidavits of the scientists Kaiser, Crowther and Hadamard attesting that it was inconceivable that Greenglass, with his conceded total lack of scientific education or training, could have performed this feat; *or that Kaiser had further attested that it was likewise inconceivable that Greenglass could even have produced the alleged original* of Exhibit 8 and of the twelve-page explanatory report. (Again, the Court assumed that such affidavits, like the assumed allegations of the petition, were confined solely to Exhibits 2, 6 and 7, sketches of the *lens mold*.)

As a consequence, the Court of Appeals could not have been aware of the fact that the grounds given in their opinion for rejecting the allegations of perjury and knowing use of perjury in connection with Exhibits 2, 6 and 7, the sketches of the *lens molds*, and for rejecting the affidavits of such scientists with reference to *such lens molds*, had in any event no application to the allegations respecting Government Exhibit 8, *the sketch of the cross-section of the Nagasaki atom-bomb* or to Greenglass' explanatory material.

These reasons given by the Court for rejecting the opinions expressed in the affidavits of the scientists were as follows:

> "In support of their renewed assertion of his perjury, defendants, on the Sec. 2255 motion, presented the affidavits of four scientists who express the opinion that Greenglass, with his limited education as shown at the trial, could not have made the sketches from memory. *Since none of them knew Greenglass, none was in a position to give an opinion about the quality of his memory, which no matter what his education, may have been amply sufficient for this purpose* (fol. 488). As additional evidence concerning Greenglass' memory, these opinions, assuming *arguendo* they would be admissible at a trial, are wholly inadequate to justify a new trial. *The affidavits bear solely on the credibility of his testimony and that issue was properly submitted to the trial jury for decision.*" (Italics supplied.)

These grounds, even were they valid, which they are not, as to Exhibits 2, 6 and 7, sketches of the *lens molds*, are, in any event, wholly inapplicable to the opinions expressed in the affidavits with reference to Exhibit 8, *the sketch of a cross-section of the atom-bomb* and to Greenglass' descriptive testimony.

The affidavit of Kaiser (and, at least inferentially of Dr. Hadamard) stated that it was inconceivable that Greenglass could, wholly from memory, have reproduced during the trial, Exhibit 8 and his descriptive testimony relating to that exhibit. *This statement had essentially nothing to do with any question of Greenglass' memory.* The real basis of the opinion that Greenglass could not have reproduced such material was that his conceded lack of scientific education and training, made it inconceivable that he had the intellectual capacity ever to have produced such informa-

tion generally, and, therefore, there was nothing on which his memory could have operated.

While Greenglass testified that he had seen blueprints of the *lens mold*, represented by Exhibits 2, 6 and 7, and had actually participated in the production of such *lens molds, Greenglass did not testify that he had ever seen a blueprint of a cross-section of the atom-bomb.* Instead, his alleged original production, in September, 1945, of a sketch of such cross-section of the bomb and of twelve pages of descriptive material as to its component elements and principles of its operation, was avowedly based on nothing more than the overhearing of unspecified conversations between unidentified persons at Los Alamos.

Kaiser, knowing the scientific knowledge necessary to produce a cross-section of the atom-bomb and twelve pages of descriptive material as to its component elements and principles of operation, was in a position to express an expert opinion as to whether Greenglass, or anybody else, with such conceded lack of scientific knowledge and training, could have produced such cross-section and descriptive material of the atom-bomb, merely from overhearing unspecified conversations at Los Alamos, and without ever having seen even a blueprint of such bomb.

That this scientific opinion was sufficient to raise an inference of perjury on the part of a witness who testified he was able to so perform is grounded in reason and in law.[9b]

> "Should a person affirm that black was white or white was black, or being in the full possession of his faculties, and having unrestricted use of his limbs, should

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[9b] The issue raised, as can thus be seen, is one of capacity (and, therefore, perjury), and not of credibility. This issue, unlike credibility, was not before the jury, but was kept from it by the ruling of the trial court which prevented the Government's expert, Derry, from responding to the sole question in the record directed toward eliciting proof of capacity. The Court of Appeals, therefore, could not properly have said that the issue had been "submitted to the trial jury for decision" (R. 336).

testify that he actually and necessarily occupied a year in walking a mile, his statements would be so in conflict with recognized possibilities as to be entitled to no credit or character as evidence." *Matter of Harriot*, 145 N. Y. 540, 546 (1895).

*Accord: People* v. *Galbo*, 218 N. Y. 283 (1916); *People* v. *Bentley*, 357 Ill. 82 (1934); *People* v. *LeBlanc*, 221 P. 2d 236 (1950); *Liggins* v. *United States*, 291 F. 888 (App. D. C., 1924).

The Court below, on the face of the record, here again, on the basis of its own understanding, determined that the affidavits submitted were "inadequate" to raise the inference of perjury.

The issue is, therefore, squarely put before this Court, in each instance, whether on the showing made, the petitioners were entitled to be heard in proof of their claim.

It should not be left to the speculative musings of a court to determine whether facts, on their face, mean one thing or another, when objective determination is possible. The general impatience of the courts with the processing of collateral attacks on judgments should not be allowed to develop from an attitude of annoyance to a hardened rule, which will foreclose, not only irritation, but justice as well.

Certainly, where two lives are at stake, basic rights should not be made to depend on intellectual sleight of hand.

## II

## The Perl Incident

The record before this Court is acknowledged by the Court below to make a showing of misconduct on the part of the prosecutor, which could not be "too severely condemned", so "wholly reprehensible", and productive of prejudice to the petitioners so beyond recall that "a new

trial . . . should have been granted" (R. 334). Yet, the Court of Appeals withheld its command to accomplish that which, in its judgment "should have been" done. The Court, thus, uniquely, consigns two people to their deaths upon its own confirmation of the corruption of the verdict upon which the convictions rest.

The unseemly result of the determination of the Court below provides evidence enough of a departure from the decisions of this Court, which enjoin upon the lower federal courts the duty, especially where life is at stake, to make effective application of the broad right of an accused to a fair verdict. *See*, e. g. *Hysler* v. *Florida*, 315 U. S. 411, 413 (1942); *Mattox* v. *United States*, 146 U. S. 140 (1892). More, the decisions of the lower courts here, taken together, evince a pragmatic concern to uphold the convictions, for each develops its own rationale, one no more justified in law than the other, to arrive at the same indefensible conclusion.

Propounding the law of the case, the Court of Appeals, on the record before it, concluded that a showing had been made, in the exposure of the "timing" of the return of the Perl indictment to break in the course of the petitioners' trial, of a scheme on the part of the prosecutor designed to injure the petitioners and concealed from the trial court by his deliberate misrepresentation.[10] It held, however, that the "essence of the wrong" done the petitioners did not lie in this calculated fraud upon the court, but in the resultant prejudicial publicity. The publicity it deemed to be prejudiced—and characterized as "wholly reprehensible"—was the prosecutor's "statement made for the press to

[10] The District Court, on the same showing of facts, reached the contrary conclusion. Although the Court of Appeals praised the District Court's opinion as "able, careful and comprehensive" (R. 330), this divergence, and others noted hereinafter, seriously put into question apologies of the District Court for the conduct of the prosecuting authorities challenged by the petitioners' application.

the effect that the government had expected to use Perl's testimony to corroborate the Greenglasses, and the intimation that because he backed out he had been indicted for perjury" (R. 334). The prejudice created by this statement, the Court was willing to assume, could not have been corrected except by a new trial. The omission of the petitioners to move for a new trial, however, the Court concluded, ousted them of their claim to relief now.[11]

The decision absolves, in result, the improbity of an unscrupulous prosecutor, by shifting the responsibility for the fairness of the trial to the victims of his malfeasance.

Since *Berger* v. *United States*, 295 U. S. 78 (1935), it has been assumed that a United States Attorney, as a "representative of a sovereignty whose obligation . . . [is] that justice shall be done", has a duty, in the public interest,

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[11] Since the Court rests its refusal to vitiate the verdict on the failure of the petitioners to move for a new trial, it is reasonable to assume that it did not mean to infer that the absence of "evidence that any juror read the newspaper story" would preclude relief, as a matter of law. In this connection, however, it is significant to note that the three admonitions of the trial judge, given prior to the Perl incident, directed only to matter respecting "this particular case" (C.R. 153, 194, 403), did not prohibit the jury from reading press coverage such as that concerning Perl. Only after the Perl stories had broken, did the trial court, as if quietly to close the barn door after the horse had gone, add the single phrase: "or anything related to it" (C.R. 847). No instructions other than these four were given during the entire trial. (C.R. 258, 320, 486, 522, 636, 698, 756, 816, 871, 949, 1024, 1072, 1132, 1187, 1248, 1309, 1364, 1441). Furthermore, the newspaper reports which accompanied the publication of the indictment by virtue of the mere linkage of Perl's name with Rosenberg and others, of importance, mentioned at the trial, were fully as damaging to the petitioners, as the single statement referred to by the Court: These reports appeared prominently in every New York City newspaper. Under these circumstances, the courts agree, that it will be presumed that the matter came to the jurors' attention. See *Holt* v. *United States*, 218 U.S. 245 (1910); *Griffen* v. *United States*, 295 F. 437 (C.C.A. 3rd, 1924); *Harrison* v. *United States*, 200 F. 662 (C.C.A. 6th, 1912); *Ogden* v. *United States*, 112 F. 523 (C.C.A. 3rd, 1902); *United States* v. *Ogden*, 105 F. 371 (D.C.E.D. Pa. 1900); *Morse* v. *Montana Ore-Purchasing Co.*, 105 F. 337 (C.C.D. Mont., 1900); *Meyer* v. *Cadwalder*, 49 F. 32 (C.C.E.D. Pa. 1891).

"to refrain from improper methods calculated to produce a wrongful conviction", which subsumes the protection of the rights of an individual accused to the due performance of that duty. *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310 (1929); *Pierce* v. *United States*, 86 F. 2d 949 (C. C. A. 6th, 1936). Where violation of this duty is "designed and an improper purpose its only explanation" it becomes the "essence of a wrong" in which are involved, not only the rights of an accused, but "the public interest in the maintenance of the nation's courts as fair and impartial forums, where neither bias nor prejudice rules . . ." *Pierce* v. *United States*, *supra*, at 953. The correction of this wrong is an obligation which the courts have held they themselves owe to that "paramount consideration", and from which an accused must necessarily benefit, although he may neither waive nor frustrate its accomplishment. *Viereck* v. *United States*, 318 U. S. 236 (1943); *New York Central R. R. Co.* v. *Johnson*, *supra*; *Estep* v. *United States*, 140 F. 2d 40 (C. C. A. 10th, 1943); *Pierce* v. *United States*, *supra*; *cf. Glasser* v. *United States*, 315 U. S. 60, 71 (1942).

The threat which cold, calculated violation of duty bears to the lawful administration of the law, has moved this Court, in other circumstances, as a policy measure, to overturn verdicts which are the "fruits of wrongdoing". Cf. *McNabb* v. *United States*, 318 U. S. 332 (1943); *United States* v. *Mitchell*, 322 U. S. 65, 70 (1944); *Meyer* v. *Cadwalader*, 49 F. 32, (C. C. E. D. Pa. 1891); *Vaughan* v. *Magee*, 218 F. 630 (C. C. A. 3rd, 1914).

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are sum-

marized as 'due process of law' . . . ." *McNabb* v. *United States*, *supra*, at 340.

The character of the misconduct here—deliberate in its inception and deceitful in its concealment from the court—evidences such a wanton unconcern for duty, disrespect for the trial court, and depraved disregard for the rights of the petitioners, on trial for their lives, as to have called for a display of the maximum disciplinary power of the Court. As Judge Frank has remarked, in another connection: "Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661 (C. C. A. 2d, 1946). In fact, the prosecutor here is a case in point of the inefficacy of a prior admonition [*see: United States* v. *Remington*, 191 F. 2d 246, 252 (C. A. 2d, 1951)] to act as a deterrent to future "reprehensible" conduct. The obligation of an accused to try his case with one eye on the newspapers, which the decision of the Court of Appeals imposes if the "prejudicial publicity is deemed the sole essence of the wrong", has not before been demanded. See, e. g. *United States* v. *Marrin*, 159 F. 767, 771 (D. C. E. D. Pa., 1908). It makes worthwhile a risk on the part of a prosecutor that his misconduct will go undetected by parties properly concentrating on the conduct of their cases in the court. *Ibid.* It becomes unprofitable only if the corruption is chargeable to its source, and results, *per se*, in the vacation of the ill-begotten conviction.

The indictment and the arrest of Perl had the effect the event was calculated to achieve. The front page of every newspaper screamed to the public that the Government had caught a "perjurer" who was associated with the "spy" Rosenberg. It was generally reported that his perjury was connected with the investigation of a "Soviet

atomic spy ring", some of whose members were then on trial (R. 73-75). The charge against him, that he denied knowing the "members" then on trial and those alleged to be in illegal confederacy with them, was also stated in the press. No sophisticated reasoning was required to infer from the reported facts that had Perl told the truth he would have inculpated the petitioners. This implicit understanding was made explicit by the statement of the prosecutor, which the Court of Appeals denounced, and declared to be so prejudicial to the petitioners that it, alone, would have warranted a mistrial (R. 333-4). *A fortiori*, the clear implication inherent in the entire press coverage, although overlooked by the Court, must necessarily be considered to have had the same effect. It would, obviously, not have occurred had the prosecutor not contrived to secure the return and publication of the indictment. It is, therefore, as effectively a consequence of his misconduct as the statement issued from his lips.

The disposition which the Court of Appeals made of this, in their view, the "essence of the wrong" done the petitioners, does violence to reality and constitutes an abrogation of its duty to protect the fundamental rights of an accused.

The Court assumed that the omission of the petitioners to move in respect to the single "wholly reprehensible" statement of the prosecutor, represented their "deliberate choice" to go on with the trial in the face of, what the Court considered to be, circumstances fatally prejudicial to them.

It inferred from this assumed "choice" that the petitioners "obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them" (R. 334). The Court on this basis decided: "Having themselves so concluded, they may not, after an adverse verdict, ask the court to reach a contrary conclusion." This deter-

mination turns well-rooted concepts of due process on their heads.

The due process clause invalidates a conviction which, in fact, has been corrupted by passion and prejudice. The record here makes an inescapable factual showing of extensive prejudicial newspaper publicity accompanying the "timed" Perl indictment. The Court apparently accepted this to be the objective fact when it ruled: "if the defendants had moved for a new trial, it should have been granted" (R. 334). The contrary *opinion* of the petitioners—assuming *arguendo* this to be their opinion—"can hardly legalize a procedure which conflicts with accepted principles of due process." *Lee* v. *Mississippi*, 332 U. S. 742, 744-46 (1948). Nor can it, according to this Court, preclude the accused from raising the due process issue. *Ibid.*

The fundamental vice of the entire structure of legal half-truths upon which the Court supports the foreclosure of the petitioners' right to be relieved of this tainted verdict, is that it is based on a factual void. The record cannot sustain a conclusion that the petitioners' omission to move for a mistrial was the result of a "deliberate choice."

The Court arrives at this conclusion by deduction from two facts alone: (1) the omission to move, (2) "after conferring with the judge" (R. 334). To justify the assumption of "deliberate choice", the facts upon which the Court relied, had to establish conclusively that the petitioners voluntarily relinquished a right, they knew themselves to have, to the declaration of a mistrial. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 (1942); *Patton* v. *United States*, 281 U. S. 276 (1930); *Glasser* v. *United States*, *supra* at 72. The state of facts upon which the Court relied may not, as a matter of law, be conclusive. *Glasser* v. *United States*, *supra* at 70. The actual facts, as shown by the record, contradict the conclusory assumption of deliberate choice, which, in any event, could not properly be

reached except after the taking of oral testimony. *Price* v. *Johnson*, 334 U. S. 266 (1948); *Walker* v. *Johnson*, 312 U. S. 275 (1941).

The record shows that the petitioners' counsel entered into the off-the-record bench conference out of apprehension of prejudice, but with no knowledge of it. He was aware only that a headline in the New York Times reported that William Perl had been indicted on a charge which linked Perl's name with the Rosenbergs (R. 155, 207; C. R. 756-7, 816). Neither petitioners' counsel, nor counsel for the co-defendant, Morton Sobell, with whom he conferred, had read the newspaper reports of Perl's indictment and apprehension, including the reported statement of the prosecutor (R. 333-4), which, according to the Court, created the prejudice against the petitioners (R. 155, 207). Nor was it proper "to charge him or his client with the knowledge of such publications during the trial." *United States* v. *Marrin, supra.* At the conference, the record shows the prosecutor made representations, whose falsity could not have been determined until over a year later, as to the regularity of the return of the Perl indictment (R. 155, 207-8). Given this regularity, it was valid to proceed upon the assumption that the publication of the indictment and factual press reports of it, though invidious in effect, would not support a motion for a mistrial. *United States* v. *Francis*, 144 F. 520 (E. D. Pa., 1906), *sentence mod.* 152 F. 155, cert. den. 206 U. S. 565.[12]

Petitioner's counsel left the bench conference no more aware of the prejudicial press reports than when he entered it, and with a mind, seduced by the misrepresentation of the

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[12] The District Court in this case ruled: "A defendant may not demand that the machinery of law enforcement be stopped while his trial proceeds, or that the prosecution of others, who as he, are charged with violating the law, be held in abeyance until his trial has been completed." (R. 15)

prosecutor, that a motion for a mistrial could not prevail. The circumstances of this case, are unlike that of *Spreckels v. Brown*, 212 U. S. 208 (1909) on which the Court below relied. There, defense counsel, with full knowledge of the facts which could injure his cause, and of his right, therefore, to the relief which the trial judge offered it, stated: "Let the jurors read the papers, we will take our chance." *Id.* at 214. Here, it cannot be inferred that counsel's inaction was prompted by a desire to take his chances with this jury; eight motions for a mistrial were made during the course of the trial (C. R. 184, 185, 1037, 1039, 1199, 1200, 1378, 1442).

The conclusive showing, on the entire record, is a negation of "deliberate choice". The demonstration is of the petitioners' intention to exercise all rights accruing to them, coupled with an unawareness of the existence of facts from which the conclusion could be drawn that the right to the declaration of a mistrial, in this instance, had accrued.[13]

To have expected the petitioners, under these circumstances, to have moved for a new trial, would have been to have required of them a sixth sense. Yet, if the fact that "they did not so move", where, had they "moved for a new trial, it should have been granted", should not, in this case, have foreclosed relief.

The decisions of this Court require that "in exceptional circumstances, especially in criminal cases" errors will be corrected where they "seriously affect the fairness, integrity or public reputation of judicial proceedings", even though

[13] Since the petitioners were no more aware of the circumstances surrounding the Perl indictment when their motions for a new trial were made on April 5, 1951, one week after the return of the verdict, than at the time of the return of the Perl indictment, the observation of the Court of Appeals that the "petitioners did not mention the prosecutor's statement in their motions" (R. 335), is inapposite. Nor could the petitioners have raised the question, as the court suggests, in the criminal appeal, since the subject matter necessarily was *dehors* the record.

not objected to or made the subject of motion by trial counsel. *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936); *New York Central R. R. Co.* v. *Johnson*, *supra*; *Wiborg* v. *United States*, 163 U. S. 632 (1896); *Pierce* v. *United States*, *supra*.

This mandate the Court of Appeals did not follow.

A verdict contaminated by the fraud, chicanery and deceit of the prosecutor—a "servant of the law"; a conviction upheld which "should have been" overthrown; the taking of two lives under such a judgment—these, surely, "seriously affect the fairness, integrity and public reputation of judicial proceedings."

It remains with this Court to right the egregious wrong.

## III

## Government Inspired Pre-Trial and Trial Publicity

This case, in the words of Mr. Justice Jackson, "represents one of the best examples of one of the worst menaces to American justice" [concurring with Frankfurter, J., in *Shepherd* v. *Florida*, 341 U. S. 50, 51 (1951)]: the practice of prosecutors—standard operating procedure in important cases—to exploit the power of the press to surround a defendant, before and during trial, with an enveloping hostile atmosphere and to create a public pre-conception of his guilt.

This practice, over the years, has been variously lamented as "unfortunate," a "serious mistake," a "gross impropriety," "ill-judged and improper," "not to be commended," and to be "seriously condemned." See: *Levlton* v. *United States*, 193 F. 2d 848 (4th C. A. 1951) cert. den. 343 U. S. 946; *Allen* v. *United States*, 4 F. 2d 688 (C. C. A. 7th, 1924) cert. den. 267 U. S. 597; *Paschen* v. *United States*, 70 F. 2d 491 (C. C. A. 4th, 1934); *Shuskan* v. *United States*, 117 F. 2d 110 (C. C. A. 5th, 1941) cert. den. 313 U. S. 574;

*Kersten* v. *United States*, 161 F. 2d 337 (C. C. A. 10th, 1947) cert. den. 334 U. S. 850.

But, like the weather, this has been a concern that "everybody has talked about but nobody has done anything about." The judicial habit of helpless piety now confronts the courts with a situation "constantly growing worse," "all too prevalent" and "becoming all too typical of a highly publicized trial." *Shepherd* v. *Florida*, *supra* at 51; *Allen* v. *United States*, *supra*; Opinion herein of Ryan, J., in the District Court (R. 13). The most hard-pressed defendants are the ones made to suffer convictions which "do not meet any civilized conception of due process of law." *Shepherd* v. *Florida*, *supra* at 53; and *see*, dissent of Frankfurter, J., in *Stroble* v. *California*, 343 U. S. 181, 198-201 (1952). The District Court, in this case, conceded as much, stating in its opinion:

> "The issuance of 'releases' and 'statements' [which 'may have prompted, encouraged or generated publicity] by the quasi-judicial officials entrusted with the heavy burden and grave responsibility of prosecution giving in advance of trial details of evidence which it is expected will be introduced at trial is all too prevalent a practice, which should not be encouraged . . . It is opposed to all fundamental concepts of due process . . ." (R. 13).

The contemporary understanding of the operation of the communal mind has evoked the recognition that its intellectual seduction produces a result, not different in essentials from "that which was found a denial of due process in *Moore* v. *Dempsey*, 261 U. S. 86." *Shepherd* v. *Florida*, *supra* at 54; *see*: *Fouquette* v. *Bernard*, 198 F. 2d 96, 98 (C. A. 9th, 1952).

The courts and the bar—including several members of this Bench—have expressed growing concern that the existing wrong find its remedy. *See*: dissenting opinion of

Frankfurter, J., in *Stroble* v. *California, supra;* memoranda opinions in *Leviton* v. *United States,* 343 U. S. 946 (1952); *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912 (1950); *Weber* v. *United States,* 73 S. Ct. 42 (1952); *Shepherd* v. *Florida, supra.*

The First Circuit in *Delaney* v. *United States,* 199 F. 2d 107 (C. A. 1st, 1952), met the problem and reached its decision on concepts of law which it evolved to accommodate the facts of life. Insofar as the instant case arises from equivalent circumstances, and relief denied, on the basis of archaic formulae unsuited to cope with this essentially modern dilemma, the cases are in conflict. The due and proper resolution of the conflict by this Court is essential both to the administration of federal criminal justice and to eliminate the terrible suspicion that American justice can tolerate the forfeiture of two lives upon convictions "which do not meet any civilized conception of due process of law."

The *Delaney* case accepts the principle that, where prosecuting officials and the Department of Justice "feed" to the press material, tending to indicate the guilt of a defendant, which results in damaging massive pre-trial publicity and a consequent communal prejudgment of guilt, it is "neither right nor in harmony with the spirit of the Sixth Amendment," to let stand the foreordained conviction.

A seeming adherence to this principle inheres in the decision of the Court below, in that it purports to evaluate the adequacy of the petitioners' showing within the frame of reference of the *Delaney* case. The single aspect, however, in which the Court holds, that the petitioners, as a matter of law, are entitled to no relief, reveals the Court's lack of understanding of the fresh concepts of the *Delaney* case, and the conflict of the decisions. The Court below ruled:

> "On the *voir dire* the prospective jurors were carefully questioned as to whether they had read or heard about the case and a jury was selected satisfactory to

the defendants, who did not even use all of the peremptory challenges permitted them. Nor do they allege that any trial juror was in fact prejudiced by the publicity now asserted to have made a fair trial impossible" (R. 332).[14]

The decision in the *Delaney* case is premised on the realistic proposition that, not only is overt proof of a subverted jury mind an impossible burden, but it is, as a matter of law, an unnecessary one. That court by Magruder, J., expressed its rationale to be:

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. This is particularly true in the determination of issues involving the credibility of witnesses." *Delaney* v. *United States, supra,* at pp. 112-113.

And the opinion logically extends the thesis:

> "Since he was obliged to stand trial in the hostile atmosphere engendered by the extra-courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions—all of them having affirmed, in answer to inquiry by the trial judge, that they were prepared to determine Delaney's guilt or innocence solely on the basis of evidence produced at the trial." *Id.* at 114.

The weight of scientific opinion supports this view. (See Appendix to petition.)

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[14] It might well be noted that many of the prospective and chosen petit jurors acknowledged that they "remembered" having heard or read about the case prior to trial, and the trial court's affirmation: "I think that is a fair assumption." (C.R. 63).

In respect to the petitioners' demonstration of objective facts tending to establish the existence of publicity from which an inference of communal prejudice and hostility could be drawn, the Court below did not deny the sufficiency of the showing. It merely finds—in an understatement not warranted by the record: ". . . the *Delaney* publicity [was] more obviously damaging and much closer to the date of trial . . ." (R. 333).

The Court, however, treats its estimate of the subjective belief of petitioners' counsel as conclusive evidence of the non-existence of prejudice resulting from the publicity. The Court drew the inference as to counsel's belief from the omission of the petitioners to move either for a change of venue or for a new trial. The exploitation of these omissions as "evidence" of the pre-trial climate is an ingenious circumvention of the refusal of the courts to preclude collateral attacks on a conviction, effected by damaging pre-trial publicity, for failure to make either motion or both. *Stroble* v. *United States*, *supra* (no pre-trial motions made); *Delaney* v. *United States*, *supra* (failure to move for change of venue); *Morse* v. *Montana Ore-Purchasing Co.*, *supra* (failure to move for a continuance).

The conclusion, moreover, is based on a record which shows counsel affirmatively to have stated (R. 152-53):

> "I most emphatically deny that I made a deliberate choice in tactics by failing to raise the issue of pre-trial publicity as a deprivation of due process of law. I could make no 'deliberate choice' because I was unaware that I had a choice."

This unawareness, counsel further stated, resulted from the unavailability to him, prior to trial, of the "complete picture" of the pre-trial publicity which "required a perusal and analysis of every newspaper and magazine circulated in the metropolitan area." His inability to acquire a

"complete picture," was a function of his personal habit of "sporadic" newspaper reading, its increased "infrequency" in the course of preparation for trial, and the fact that "only . . . within the last few months" did he acquire sufficient funds [15] "to probe the newspaper materials that surrounded this case, which led [him] to the conclusion that it was proper to raise the issue of the pre-trial publicity" (R. 152-53).

This precise state of facts was envisioned by this Court, in *Price* v. *Johnson, supra* at p. 291, as "justifiable" reasons for not making earlier application for relief. The Court there stated:

> ". . . The primary purpose of a *habeas corpus* is to make certain that man is not unjustly imprisoned. And if for some justifiable reason *he was previously unable to assert his rights or was unaware of the significance of relevant facts*, it is neither necessary nor proper to deny him all opportunity of obtaining judicial relief." (Emphasis ours.)

*Price* v. *Johnson, supra*, and *Walker* v. *Johnson, supra*, make it completely clear that, in any event, the "justifiability" of the reasons may not be determined on the face of the record, but only on testimony adduced at an oral hearing.

In this case, it was particularly inappropriate to reject, especially on the face of the record, the justifiability of the reason asserted. The "complete picture", as counsel stated, was indispensable to any judgment of the probability of any effect on attitudes being created or reinforced by mass media. The weight of social-psychological opinion insists that, until full material has been assembled and its bulk and content read, such a judgment cannot reasonably be made

[15] Petitioners, at their trial, proceeded *in forma pauperis*.

(See Appendix, Section A).[16] A comprehension of this concept—or even plain "horse sense"—renders ludicrous the Court's decision to select petitioners' counsel—or any one person—as the "guinea pig" of public reaction.

A burden is imposed upon an accused, to secure his presumption of innocence and right to defend from out-of-court influence, to monitor the mass media of communication in the period preceding trial. Where the threat arises solely from publicity deriving from the private initiative and enterprise of newspapers, the courts, presented with a Solomon's choice in the conflict between the parallel rights to freedom of press and a fair trial, may take pause—although, it is suggested, in this matter that this Court "has not spoken its last word." *Delaney* v. *United States, supra* at 113.

The instant case, however, as it concerns publicity caused and stimulated by prosecuting officials, presents that aspect of the modern phenomenon of "trial by newspaper" that is controllable in the proper exercise of this Court's power. Its control, by silencing those who owe a duty of silence, will eliminate perhaps the most damaging influence in "newspaper trial": the affirmations and opinions of officials, to the prestige of whose office the public generally accords a reputation for infallibility. For this Court to refuse to exercise this supervisory power over the administration of federal criminal justice, will permit the continuance of a practice to which Mr. Justice Frankfurter so eloquently objected in his dissenting opinion in *Stroble* v. *California, supra* at 201:

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[16] Such a judgment, in social-psychological opinion, cannot be made with accuracy by laymen, including judges. The petitioners' offer of proof of the evaluative testimony of a mass psychologist was particularly apposite (R. 242). The rejection of this offer deprived the petitioners of the opportunity to present important substantiating material in support of their claim, and constituted an abuse of the Court's discretion.

"To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice."

## IV

## The Atom-Bomb "Secret"

*United States* v. *Heine*, 151 F. 2d 813, 815 (C. C. A. 2nd, 1945), cert. den. 328 U. S. 833, construed the Espionage Act to read that, unless information alleged to be the subject of transmittal—or conspiracy to transmit—to a foreign nation is "secret", no crime is committed under that law. "Secret" information, as defined by the *Heine* case and *Gorin* v. *United States*, *supra*, has the meaning accorded to the more common usage: "classified" information.

This gloss was put upon the statute, in the belief that unless it were so limited it would represent a "drastic repression of the free exchange of information," violative of the First and Fifth Amendment to the Constitution. *United States* v. *Heine*, *supra* at p. 815; 59 Harv. Law Rev. 617 (1946). The application of the statute to situations beyond the bounds judicially described as proper would, therefore, be without constitutional sanction, and a person so convicted would suffer a violation of his constitutional rights.

The record shows facts to establish that the material, alleged to be the subject of the transmittal by the conspiracy of which the petitioners were allegedly a part, avowed to have been classified as "secret", was arbitrarily and capriciously so classified. In fact, it was not "secret" material, but scientific and technological matter widely known and published throughout the world.

the labor press and General Motors Corporation employed content analysis in the "My Job Contest" reported in 1950 by GM's Research Director.

It is asserted that the material presented above, taken together, demonstrates that the judgment of the content of mass communications and their manifest import is indeed the province of the specialist. While laymen may make guesses this way or that about the effective content of a series of newspaper stories and headlines, techniques have been developed which make it possible to assess objectively the nature and magnitude of communication content relevant to a specific issue. Where important issues are at stake, it is the obligation of the courts to bring to bear on the problem the best opinion available, and the most advanced techniques known to science before passing judgment on a matter beyond the judgmental competence of the layman. Thus, it is held, that expert testimony is required, if a fair evaluation is to be made, as to the actual character of the content of the publicity before and during the trial.

B. *Opinion Analysis as an Established Science*

If it were possible for the layman to decide, without the use of special techniques, what the given state of opinion is on a particular subject, it would ideed be unnecessary for the payment of millions of dollars to experts in order to find this out. Thus, the very existence of this branch of science urges the necessity of its employment in the case at hand. Counsel for the petitioners may state that the community attitude was indeed prejudicial and the prosecutor may argue that it was not. But only the trained expert can be trusted to advise on this issue. Lest it be thought that the estimation of the state of opinion on any issue is an easy matter for the layman to judge, it is of value to cite some of the investigations made by social psychologists to determine this fact. Several such investigations were conducted by Professor Travers,[4] then of Columbia University. Using students as subjects, he attempted to find out to what

[4] Archives of Psychology, 1943.

The Court of Appeals relied on the assumption of Judge Ryan that what the petitioners showed "is so." Under these circumstances, the Court below could not, without a hearing determine that "*United States* v. *Heine*, 2 Cir. 151 F. 2d 813, cert. den. 328 U. S. 833, upon which the appellants rely, is so different in its fact as to be completely inapposite" (R. 336).

## Conclusion

The writ of certiorari should be granted, and the decision of the Court below, affirming an order of the District Court denying, without a hearing, the petitioners' motion for relief under 28 U. S. C. § 2255, should be reversed.

Respectfully submitted,

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(7304)

degree they were able to judge the opinions of others with whom they had been working. He concluded:

> "The errors in individual judgments of group opinion were very high, even concerning the group *with whom the subjects had been working* . . . Several judges expressed surprise when informed of the error they had made. Confidence which many feel in their ability to judge group opinion is largely unjustified."
>
> "The present study suggests that people should show more caution before asserting that the opinion of any group is either this or that, even in cases where there has been close contact between the individual and the group . . . people have not realized how difficult it is to make accurate judgments (regarding group opinion) just as thirty years ago they did not realize how difficult is the task of judging personality."

Travers went on to determine to what extent it was possible to estimate even the knowledge of a group, and here likewise he found individual judgment inadequate. Individual judgments of group knowledge, he finds, are highly unreliable and he urges that those, like educators, who need to know the state of knowledge of a group, refrain from relying on their own judgments but utilize appropriate techniques for such measurement.

In an even more compelling study by Professor Wallen of the University of Cincinnati, reported in 1943 in "Individual Estimates of Group Opinion," Vol. 17, P. 269 (1943), *Journal of Social Psychology*, the capacity of individuals in a small community to judge the state of opinion in that community was investigated. Asking the subjects to estimate the state of opinion in three questions of current concern, Dr. Wallen concludes:

> "In summary, we have found that in a small, well-knit college community, where a high degree of social interaction should favor accurate estimates of group opinion, considerable variability existed in such estimates . . .
>
> "Correlations between absolute errors made on the three estimates were so low as to lead to the conclusion